UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 10 CR 615 (NGG)

: United States Courthouse
-against- : Brooklyn, New York

RONALD HERRON, : June 24, 2014

Defendant. : 10:30 o'clock a.m.

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TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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(The following occurred in the absence of the jury.)

THE COURT: All right. Appearances, please.

MR. ARIAIL: Good morning, Your Honor.

Shreve Ariail, Sam Nitze, Rena Paul, Special Agent Ami Marayag for the United States.

THE COURT: Good morning.

MR. SOLOWAY: Robert Soloway and James Neuman for Ronald Herron.

Good morning, Your Honor.

THE COURT: Good morning.

Okay. You have gone over the verdict sheet with my law clerks and some changes were made. Just take a look at it. I have just reviewed it. It looks pretty good to me. Let me know.

MR. SOLOWAY: Yes, Judge.

MR. ARIAIL: We are looking, Your Honor.

THE COURT: All right. There are just a few changes that were made.

(Pause.)

All right. Any issues about the verdict sheet?

MR. NITZE: Yes, judge.

We have one phrase we think ought to be cut.

THE COURT: What is that?

MR. NITZE: This is a phrase --

THE COURT: Tell me what page you are on.

MR. NITZE: We are on page six, Count four.

In light of how the arguments proceeded, it is the government position that we shouldn't have the Pinkerton language here or in connection with that charge in the main charge on these counts. So we would suggest that on Count Fourteen, we just cut the phrase, or is responsible for the discharge of a firearm through coconspirator liability.

MR. ARIAIL: To be clear, Your Honor, at this point the government is not advancing a theory with respect to the Richard Russo homicide through coconspirator liability going forward at this point.

THE COURT: All right. You will remind me of that when I get there on the charge.

MR. ARIAIL: Yes, Your Honor.

THE COURT: Did you hear that?

MR. SOLOWAY: I heard it. We have no problem with that.

THE COURT: Obviously.

Anything else on the verdict sheet for now? Unless there is something that comes up in connection with the charge itself?

MR. NEUMAN: Nothing else.

THE COURT: Okay. We will make that change.

As you know, I give each juror a copy of the verdict sheet but only the foreperson will have the signature copy.

Also, I give each juror a copy of the jury charge in the jury room, not when I am reading it.

All right. You have draft two. Have you reviewed draft two?

MR. NEUMAN: Yes.

MR. SOLOWAY: Yes.

MR. NITZE: Yes.

THE COURT: All right. I will go page by page. You tell me when to stop.

Pages one, two, three, four?

MR. NEUMAN: Something on page four, Judge.

It doesn't necessarily need to go here but it might. We wanted some instruction on the guilty pleas of other individuals and I will hand it out. It comes straight from Sand. May be a difference of -- making it plural instead. I

am not sure it should go in this place but I think something like this is needed. I have the Sand version also but it's really essentially identical. I think it makes it plural. I will hand you the Sand, in case you want to see it.

(Pause.)

MR. ARIAIL: Your Honor, we don't have any problem with it.

THE COURT: With what?

MR. ARIAIL: With the language as proposed.

THE COURT: Okay. That's fine. I sort of like the Sand language myself.

MR. ARIAIL: If the Court thinks we should use the Sand language?

THE COURT: Since I am not the author of either one, I am not terribly enamored of anything.

MR. ARIAIL: Perhaps Your Honor could articulate the difference. I didn't see it.

THE COURT: It is just a style thing. Do you really want to know or can we move on?

MR. ARIAIL: We defer to Your Honor.

THE COURT: I am just going to take the proposal from Mr. Neuman. I am going to put it after number of witnesses and uncontradicted testimony, after seven on page five.

Any problem?

MR. NEUMAN: That's fine. Thank you.

MR. SOLOWAY: We have something else on page four, Your Honor.

THE COURT: What else?

MR. SOLOWAY: The reasonable doubt charge, Your Honor, I know there was discussion about that at the previous charge conference. I wanted to raise one or two points regarding that.

The first one, Your Honor, is on page five. Your Honor writes, in the paragraph starting on any count, if after a fair and impartial consideration of all the evidence, you honestly conclude that you have such a doubt as would cause a -- we are requesting the language or the word reasonable there, but that's our request.

THE COURT: Where?

MR. SOLOWAY: Where it says, as would cause a prudent person, we are requesting reasonable person. And this language, to hesitate to act in a matter of importance in his or her own life, then you have a reasonable doubt. In that event, it is your duty to acquit the defendant on that count.

And then the next paragraph, which most respectfully, Your Honor, I -- I find somewhat confusing, or confusing, I guess is the word, we would use. We would propose to change the language in the succeeding paragraph that starts, if, on the other hand, to the following: If, on

the other hand, you do not have such a doubt, then, going to where Your Honor begins the word, then you have no reasonable doubt and in that circumstance you should convict the defendant on that count.

The paragraph that Your Honor writes there comes from a section of Judge Sand's proposed charge that reads -- this is instruction 4-2 -- proof beyond a reasonable doubt must, therefore, be proof of a convincing character of -- that -- I think it should say, such a convincing character, and in the and charge it says of a convince -- be proof of a convincing character -- I think it should say such -- that a reasonable person would not hesitate to rely upon in making an important decision.

Your Honor has put that sort of concept, which is something of a core concept in Judge Sand's proposed charges into a paragraph that involves something else, essentially.

I -- but, anyway, the language that we are proposing is -- is what I articulated, that in the paragraph where Your Honor talks about an abiding belief in the defendant's guilt, that you would be willing to act upon a similarly strong conviction in an important matter in your own life, that you just make that paragraph more simple and follow logically the preceding paragraph, which is about what happens when there is a reasonable doubt. Logically, the next concept that should come out is what happens when you don't have a reasonable

doubt.

But we believe that the language that talks about whether they'd be willing to act in their own lives in that context just creates confusion as to what is really a rather straightforward concept and ask that it be made into a straightforward concept instead of injecting into it some sort of other things.

I don't know if I have stated that clearly but the request we made I think I stated clearly for the record.

MR. NITZE: We have a response. Just so I am clear, with respect to that final paragraph, can you just -- how do you want it to read?

MR. SOLOWAY: If, on the other hand, you do not have such a doubt, then you have no reasonable doubt and in that circumstance you should convict the defendant on that count.

MR. NITZE: Okay. So with respect to the suggestion for the paragraph that begins, on any count of the indictment, respectfully, doesn't make sense to put the word reasonable before the word doubt when it says honestly conclude that you have such a doubt because the whole purpose of the paragraph is to help the jury understand what a reasonable doubt is and it --

MR. NEUMAN: I think --

MR. NITZE: You wanted to insert the word reasonable?

MR. SOLOWAY: That's in the preceding paragraph, where the judge said prudent.

MR. NEUMAN: Prudent.

MR. SOLOWAY: I just said reasonable. That's the only thing I changed.

MR. NEUMAN: Instead of prudent.

MR. NITZE: My apologies. I misunderstood.

We don't have any problem with that. We don't see why the word own is necessary. Hesitate to act in matters of importance of his or her life. It's pretty clear they are talking about their own lives.

Then with respect to the final paragraph, perhaps the language from Sand that you read works in that final paragraph.

MR. SOLOWAY: My observation about what Mr. Nitze said is the following. In Judge Sand's charge, which is in some respects a model of clarity, he says or proposes in paragraph one of that charge, in defining what is a reasonable doubt and saying that the words almost define themselves, he says very simply, it is a doubt based on reason, period.

And then -- and Your Honor referred, of course, to style and style in some respects is important. He says in the next sentence, it is a doubt that a reasonable person after -- has after carefully weighing all the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a

matter of importance in his or her own life.

That language, as I tried to point out, is language that Your Honor has inserted in an area where there are other, I believe, concepts being discussed.

And one of the other or second request that we have is that the language that Judge Sand has proposed in which he says that a reasonable doubt is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her own life be utilized in this charge to define to the jury what is a reasonable doubt.

THE COURT: That is the paragraph that starts on any count, right? That's the first paragraph that you want reasonable -- in place of prudent, you want own before life, in his or her life?

MR. SOLOWAY: Yes.

THE COURT: All right. That's fine.

Let's talk about the last paragraph. What about the -- do you have Sand there?

MR. NEUMAN: Yes.

THE COURT: Just give it to me, please.

MR. NEUMAN: Yes.

THE COURT: First of all, I don't know, with all due respect to Judge Sand, who doesn't write it anymore, whether everything that's in Sand's instructions is the model of clarity. I am not going into that. I am not an expert on it.

But I don't always use Sand. Sand is not the bible.

MR. SOLOWAY: Of course, Your Honor.

THE COURT: I just point that out --

MR. SOLOWAY: Of course.

THE COURT: -- for whoever may be listening now or hereafter. Okay?

MR. SOLOWAY: Yes, Your Honor.

THE COURT: There is Garaufis.

MR. SOLOWAY: Yes.

THE COURT: Garaufis is the model of clarity when Garaufis decides that he is the model of clarity. So don't throw Sand at me one way or another.

Did we discuss this the last time?

MR. NEUMAN: What happened last time, I first asked that we just adopt our original proposal. Then I said, as an alternative --

THE COURT: I just didn't remember discussing it in this kind of --

MR. NEUMAN: My alternative was that Sand and then we discussed one narrow change.

THE COURT: That's fine. No problem.

What is your view about this last paragraph here?

MR. ARIAIL: Your Honor, I think it's not clear to us what is being proposed by the defense to replace it. That's kind of why --

THE COURT: Tell me again what you want to replace it with.

MR. SOLOWAY: We want to replace the last paragraph.

THE COURT: You don't have it written down or anything? This is just --

MR. SOLOWAY: You know, judge, I do have it written down.

THE COURT: Did you give it to me that way in the original?

MR. SOLOWAY: Well, it's simply --

THE COURT: No. When you gave me your proposed jury instructions, was it there?

MR. SOLOWAY: No.

Because this is a modification. In our proposed reasonable doubt charge, it is not there. This is a modification.

THE COURT: I didn't miss something?

MR. SOLOWAY: No.

THE COURT: All right. Just checking. So tell me.

MR. SOLOWAY: We have simply, Your Honor, and I think it is simple, said that the language of Your Honor's charge -- this is our proposal, that begins with the word such on the second line of the last paragraph, and concludes with the word life be omitted. That's really all we are proposing.

And that we are -- and we are asking that be added,

if -- when you say at the beginning of the paragraph, I'm sorry, if this is confusing but if, on the other hand, you do not have such a doubt, you would then, again, we are asking that -- I guess actually that also would be omitted. You honestly conclude that you have such an abiding belief. That's also part of the omission we are proposing.

MR. NITZE: Can we just have -- not -- without what you take -- just what would it say?

THE COURT: Just read it.

MR. SOLOWAY: Okay. I did that. But I am going to do that again.

THE COURT: Go ahead.

MR. SOLOWAY: If, on the other hand, you do not have such a doubt, then you have no reasonable doubt and in that circumstance you should convict the defendant on that count.

MR. ARIAIL: May we take a look at Sand's, Your Honor?

THE COURT: Here. I don't think it helps much.

(Pause.)

MR. NITZE: We have a position we would you to like to articulate.

THE COURT: Sure.

MR. NITZE: First of all, we actually -- I misspoke because I had the -- I misunderstood Mr. Soloway a little bit about that first paragraph. We do really think prudent is the

word that's always used in this charge instead of reasonable. The point is, you are defining reasonable doubt. It is a prudent person. So we actually firmly do request that that stay prudent.

With respect to the final paragraph, we would just ask -- we think this is -- the proposal is a good one but we ask that we keep after a fair and impartial consideration of all the evidence phrase. So the final paragraph would read in its entirety as follows:

On the other hand, after a fair and impartial consideration of all the evidence, you do not have such a doubt, then you have no reasonable doubt, and in that circumstance you should convict the defendant on that count.

It is essentially the defense proposal but reminding the jury that this is to come after a fair and impartial consideration of the evidence.

MR. SOLOWAY: We have no objection to that.

THE COURT: All right. You have no problem with in his or her own life?

MR. NITZE: We will take own in exchange for prudent.

THE COURT: I am going to put prudent back in. I am putting own in after her, before life. In the next paragraph it will read: If, on the other hand, after a fair and impartial consideration of all the evidence you do not have

such a doubt, then you have no reasonable doubt and, in that circumstance, you should convict the defendant on that count.

MR. SOLOWAY: Okay. Yes, Your Honor.

THE COURT: All right.

MR. SOLOWAY: And the other -- so that we are -- two parts to this request, and the other part that I just want to be clear, and Your Honor obviously will do what Your Honor judges is best.

THE COURT: Yes.

MR. SOLOWAY: Was that the language that Judge Sand -- again, I understand what Your Honor said -- where he proposes that language in reasonable doubt charge include, quote, that a reasonable doubt is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her own life, be put somewhere in the charge.

MR. NITZE: Isn't that the paragraph we just fixed?

MR. SOLOWAY: Okay. The point that -- we took it out of that paragraph.

MR. NITZE: Sorry. I misunderstand again.

THE COURT: On any count of the indictment paragraph? Such doubt as would cause a prudent person to hesitate to act in matters of importance of his or her own life is in. I didn't take it out.

MR. SOLOWAY: Very good. I'm sorry.

THE COURT: It is just in the next paragraph where

we have the abiding belief material that I took out.

MR. SOLOWAY: Right. I'm sorry. That's right. So both parts --

THE COURT: So we are set?

MR. SOLOWAY: We are set on that Your Honor, yes.

THE COURT: Okay. Anything else on the charge or can we all go home now?

MR. NEUMAN: Not quite.

THE COURT: Page six?

Page seven?

Page eight?

Page nine?

Ten?

Eleven?

Twelve?

Thirteen?

Fourteen?

Fifteen?

MR. ARIAIL: We have something on 15, Your Honor.

THE COURT: Yes --

MR. NITZE: Defense counsel --

THE COURT: What paragraph are we on?

MR. NITZE: We are on page 15, paragraph 19. This is the punishment paragraph.

THE COURT: Yes.

MR. NITZE: Several times during defense counsel's closing arguments there was a reference to his client going away for the rest of his life. It is the government's view, based on this charge and based on how this is customarily handled, that references to the penalty that the defendant may or may not face is not properly before the jury. In light of the repeated references to life imprisonment in summation, we would request just some language that any references to -- we can craft something but any references to the term of imprisonment the defendant may or may not face in the event of a conviction are not for your consideration and there is no evidence in the record concerning such punishment.

THE COURT: The fact is, if he is convicted of racketeering but not convicted of murder, then he is not going to jail for the rest of his life. At least he may not go to jail for the rest of his life. Right?

MR. SOLOWAY: Right.

THE COURT: It might mislead the jury to think that if they convict him for anything here he would go to jail for the rest of his life.

MR. SOLOWAY: He obviously is facing several counts that are mandatory life counts.

THE COURT: Right.

MR. SOLOWAY: I have no problem with the language the government is proposing.

THE COURT: Give me some language. Write it down.

MR. SOLOWAY: I would point out though, Judge, just one thing, which is that Your Honor is charging that the Court notes in the last sentence of that paragraph that the death penalty is not available as a punishment in this case. But it would be, if you are going to do that, fair to tell the jury as well, and -- after you say not available as a punishment in this case, and the maximum -- okay.

To read the whole thing.

The Court notes that the death penalty is not available as a punishment in this case but the maximum sentence that is available is life imprisonment. So that the jury will know that we are talking about no death penalty, we are also talking about the reality being that the defendant is facing the possibility of a maximum of life imprisonment.

So I have no problem with that, as long as that sentence about the death penalty is qualified so the jury is fairly informed of what is clear from the evidence in the case. Every witness who was charged with similar crimes as my client, testified repeatedly that the maximum sentence they were facing is life imprisonment. It's certainly pretty obvious to the jury, probably, I would say, that that's true of the defendant too, who is charged with the same exact crimes that these witnesses were talking about.

MR. NITZE: The government strongly objects to any

reference to the term of imprisonment that's available or required in connection with the murder charges. The reason is, the purpose of this charge is to take out of the jury's minds to the extent possible consideration of punishment and Your Honor, the government thinks rightly, had some concern that the death penalty might be in the jurors minds based on responses that came out in the questionnaire and the government's view is that this reference to the death penalty was to remove a concern so that the jury can go about their deliberations uninfected by considerations that are not properly in their minds.

To affirmatively indicate, and there is life imprisonment for certain charges and not for others, is the opposite -- is the opposite of what the charge is intended to do. That is, it puts in their minds consideration of penalty and we don't -- they are not supposed to be thinking about penalty.

So the government would just propose that after the sentence that reads, the Court notes that the death penalty is not available as a punishment in this case. Furthermore, any reference by counsel to possible penalties facing the defendant in the event of a conviction -- I have to think about -- I am saying that off the --

MR. SOLOWAY: Is not properly for your --

MR. NITZE: Is not properly for your consideration

and there is no evidence in the record concerning potential punishment.

MR. NEUMAN: Judge, if I might point out something?

The jury was already informed in the questionnaire process that this is not a death penalty case. I think the simplest thing to do is to take out any language of punishment, including the death penalty. If we are going to have the death penalty there, it is -- it is true, that as Mr. Soloway said, that witnesses have testified that they face the -- a potential life sentence on the crimes and it's the same crimes.

MR. ARIAIL: They also testified that they pled guilty to some of the same crimes. We are not bringing that in. That's exactly what we are trying to take out, is any inference that they might take from those things.

MR. NEUMAN: We are talking about whether there is something in the record. My point is, there is a record.

THE COURT: I think the problem with that, Mr. Neuman, is that there was significant misunderstanding at the voir dire as to whether the death penalty was actually available. I had to instruct certain of the potential jurors that indeed the death penalty was not part of this case, even though it was clear from the questionnaire that it wasn't part of the case.

So my concern is that, in the event there is some

lingering misunderstanding, I wanted to quash the misunderstanding because it could infect the jury's deliberations. That wouldn't be fair.

The fact of the matter is, that punishment except in the death penalty case is never a subject of concern for the jury. We tell every -- this is a standard charge, but the specter of a life sentence was raised by the defense in questioning and that's not the government's fault. This simply clarifies that the subject is not for the jury's consideration. That's all.

So give me some language and I will consider it.

MR. SOLOWAY: But the -- the life sentences came out on direct, Your Honor, on the government's witnesses direct testimony. They were asked those questions by the government. Right?

MR. NITZE: Yes. There was testimony about life sentences. That's unavoidable in the nature -- in the context of fronting and then having cross-examination about penalties. That's -- you can't -- that's just has to come out and it does come out in testimony.

That's entirely different from standing before the jury in summation and saying, you've got -- this is one of the most important decisions you'll have in your life. Whether to send my client to prison for the rest of his life. that's -- I mean, charitably, that is designed to stoke the

sympathy of the jurors to say you've got a heavy load on your shoulders. This guy is going away for the rest of his life if you convict him.

It shouldn't be said in summation, and because it was and because it's not proper for the jury to consider punishment, we are requesting a sentence or two at the end of this charge to make that abundantly clear. That's the government's position.

THE COURT: There was testimony -- and the testimony wasn't only from the government witnesses. There was also testimony from a defense witness as to a life sentence without the possibility of release. So everybody put witnesses on.

MR. SOLOWAY: You are talking about Kendale Robinson, Your Honor? Smurf? Who testified that he was serving a sentence of life imprisonment without parole? I am not sure what Your Honor is referring to.

THE COURT: Yes, him.

MR. SOLOWAY: Yes. We --

THE COURT: I am not saying you shouldn't have put him on. I'm just saying it came up. It has come up with a number of the witnesses. But a jury verdict in this case wouldn't necessarily result in a life sentence. If there is an acquittal on all three of the murders, then the racketeering charges and the gun charges and whatever else, but it would be a term of years kind of sentence.

MR. SOLOWAY: I think language that's crafted that tells the jury that sentencing is not part of their proper consideration is no problem. That's what Your Honor should charge and that's perfectly fine.

THE COURT: Let me see your language.

MR. ARIAIL: I think it would have been perfectly fine if defense counsel hadn't made such an issue of it before the jury in summation. That's why we are responding.

THE COURT: I understand why you are doing that. I need to see the language. I will let you know.

Next.

Still on 15?

MR. NEUMAN: Judge, on the -- the bottom of the page, interviews of witnesses, we just would like to change, instead of testimony at trial attorney for the government, attorney for both sides.

THE COURT: Yes.

MR. ARIAIL: I think we agreed to that earlier.

THE COURT: I didn't remember that. I saw it. I think we should change it.

MR. NEUMAN: I think maybe --

MR. SOLOWAY: We have specific language on this we would like to read, Your Honor.

THE COURT: More language?

MR. SOLOWAY: Just read the entire --

MR. NEUMAN: Okay. The other -- on the following page, the sentence that starts, to the contrary, we are just asking that it read attorneys for both sides rather than just attorneys.

THE COURT: That's fine.

MR. ARIAIL: Yes. At the bottom of page 15 it should be the government and the defense.

THE COURT: I got that.

MR. ARIAIL: Okay. That's fine. Both of those are fine.

Next.

MR. SOLOWAY: Are we on 16 still?

THE COURT: We are. We are up to cooperating witnesses called by the government.

MR. SOLOWAY: You know, with respect to this charge, we were asking that -- in the second complete paragraph that the language in the sentence that begins, indeed, it is the law in federal courts, and again this is from Sand. I hesitate to point that out but he says, his language is: Indeed, it is the language in the federal courts that the testimony of accomplices, I believe is exactly -- rather than of a single accomplice, and that's the language we are requesting. That the testimony of accomplices may be enough in itself for conviction rather than --

THE COURT: Is that the law? Is that the law?

MR. SOLOWAY: No, I don't think it is the law.

THE COURT: I am not going to tell them something that's not the law. The law is a single accomplice or coconspirator can be the basis for a guilty verdict. This isn't the state court. This is the federal court.

MR. SOLOWAY: Yes, that is the law.

THE COURT: I am just --

MR. ARIAIL: We think the language is appropriate, Your Honor.

THE COURT: All I'm saying to you is that a more generic statement you could argue might be better, but I think this is a more -- this states the law and I see no reason to change something that states the law for a more generic statement. Unless there is a good reason for it.

What's the good reason? You like it better?

MR. SOLOWAY: Yes.

THE COURT: I am not doing it.

Next.

MR. SOLOWAY: Okay.

THE COURT: Sixteen?

Seventeen?

Eighteen.

MR. NEUMAN: Judge, we have a suggestion about language concerning presentence reports that I will hand up that I think would be appropriate on page 18.

THE COURT: Let me see it.

This is what I asked you for actually, isn't it?

MR. NEUMAN: Yes.

THE COURT: All right. Thank you.

(Pause.)

MR. ARIAIL: We don't have any objection to this language, Your Honor.

THE COURT: Okay. I would say that it is somewhat disingenuous because lawyers often raise objections to offense conduct on behalf of their clients because the presentence reports are used for designations to facilities. It is often the case that an overstatement of the gravity of a crime may result in a designation to a more secure facility. I have been doing this for 14 years. I guess I have sentenced about nine hundred people to prison and oftentimes lawyers will raise these issues.

I don't mind putting that in, frankly. But I'm just telling you, in good conscience, any lawyer who doesn't object to an overstatement of offense conduct is not doing a proper job of representing his or her client. That's all I'm telling you. So just bear that in mind.

I want that on the record, that I expect any lawyer who believes that the offense conduct has been overstated to tell the Court, either in their written objections or at the time of sentencing, so the Court could consider revisions in

the presentence report, which is going to the Bureau of Prisons for designation. I just point that out to you, very important to the Court, that it be done right and that someone's offense conduct not be overstated.

MR. ARIAIL: Your Honor, in this case, just so it is clear, that in that letter the attorney actually made a statement agreeing with his client's involvement in the offense conduct. So it was actually an affirmative statement.

THE COURT: That's all right. I am just saying that when I read that proposal, my concern is that you understand my perspective, that it is the lawyer's obligation to bring to the Court's attention any overstatement of the offense conduct. That's all.

Okay? We are done.

So we are putting it in.

Next?

Eighteen?

Nineteen?

Twenty?

MR. NEUMAN: Judge, the --

THE COURT: Are you back on identification testimony?

MR. NEUMAN: Yes.

THE COURT: I thought we dealt with that.

MR. NEUMAN: We did. But I thought -- what I was

suggesting before, I thought that you accepted, was the Sand version of identification which is a fuller account. But maybe you've already -- if you have considered that and this represents your understanding, I don't want to belabor the record.

MR. ARIAIL: My recollection is we already negotiated this one, Your Honor.

THE COURT: One moment, please.

(Pause.)

We eliminated the paragraph three and paragraph five of what you had recommended. I took that out.

MR. NEUMAN: All right. If you've already considered it, then --

THE COURT: I said that's what I was going to do. I thought I had resolved that.

MR. NEUMAN: Okay.

THE COURT: I considered what you said and then I decided that I would replace what was there with the Sand instruction, paragraphs one, two and four.

MR. NEUMAN: All right.

THE COURT: And leave out three and five. That's how I resolved it.

MR. NEUMAN: Okay.

THE COURT: That is my recollection.

Page 20?

Twenty-one?

MR. SOLOWAY: We have something on page 21, Your Honor.

THE COURT: Okay.

MR. SOLOWAY: In the surveillance videos, paragraph 31.

THE COURT: Yes, sir.

MR. SOLOWAY: We are requesting that the last sentence that Your Honor charge as follows: That I instruct you that the government's recording of such surveillance videos is lawful.

We request that specifically because it seems that the word appropriate after lawful is to some extent injecting some view of the Court about something relating to appropriateness, which we would argue isn't -- usurps the jury's function a bit.

To instruct that it is lawful, is proper, and gives the jury the information that the charge is intended to provide, to the extent that anybody on the jury would feel that there was something unlawful here.

THE COURT: It is ironic, that you are making the statement about appropriate when you spent so much time in your closing talking about the appropriateness of using all these different means of investigation. So you understand? I don't know what their position is, but I think it's ironic

because you made a big statement to the jury, which was perfectly appropriate, that there were other appropriate things to do in order to conduct a full investigation. Here, you want the word appropriate taken out because it might indicate that they were doing what you said they hadn't done in other situations.

Isn't that sort of inconsistent?

MR. SOLOWAY: No, it's not inconsistent, Your Honor.

Because my summation on those points was about one thing, and that one thing was lack of evidence and lack of evidence is something that the jury has a right and duty to consider. If you don't provide the jury with context -- now I am talking about -- that's my position, Your Honor.

THE COURT: I understand.

Okay. Do you have any objection to taking, and appropriate out?

MR. NITZE: Yes.

THE COURT: Why?

MR. NITZE: Because it is interesting that Mr. Soloway states that the word appropriate usurps the role of the jury because that suggests that a part of the role of the jury is to evaluate the appropriateness of this particular technique and it isn't. I think the reason -- the word appropriate is hardly this big stamp of the Court's imprimatur on this technique. It is, rather just to say don't worry

about that aspect. It is lawful and it is appropriate. Move along to your deliberations. It is designed to take -- again, something to sort of take out of their mind.

So in light of the way the defense arguments went on that subject, but more to the point, because of the purpose of this charge, we think appropriate is appropriate.

THE COURT: I am going to take out the word appropriate. That is it. Because the only other way I would leave it in is an additional sentence, which deals with the fact that the jury has the right to consider or not consider this evidence in connection with its responsibility to reach a verdict. I just don't want to add anything. There is enough here. It's over 80 pages long and I think that it is lawful, it is lawful. They can do with it what they want.

MR. SOLOWAY: The defense never suggested it was unlawful.

THE COURT: All right. I don't think there is anything wrong with appropriate but if it raises the specter of the Court giving it its seal of approval, again, I -- -- I also think the defense raised the appropriateness of different types of investigation and the need for these other types of investigation. You can't have it both ways, generally speaking, in my view.

But go ahead. Next.

MR. NITZE: Your Honor, when it is convenient for

the Court, we have some language on the issue we were talking about before with you. We can do this at the end or whenever.

THE COURT: Let's wait. Let's try to get past page 22 here.

Twenty-two?

MR. NEUMAN: Yes. Judge, I am not sure if the record was entirely -- if I made the record clear the last conference, that we just object to the consciousness of guilt language altogether.

THE COURT: Yes, I know you did.

MR. NEUMAN: I want to make sure of the record.

THE COURT: You have your exception on that.

MR. NEUMAN: Okay.

THE COURT: Twenty-two?

Twenty-three?

Twenty-four?

Have you seen the way it has been restructured? That is what the government had in mind?

MR. ARIAIL: Yes, Your Honor.

MR. SOLOWAY: Judge, I think we can point out at this point that we have nothing else in terms of objections or additions to add to the rest of the charge. I wanted to let you know that. I don't know if the government is proposing any changes.

THE COURT: Let me hear from the government. Why

don't you take me through what you have.

MR. ARIAIL: Certainly.

THE COURT: So I am not going page by page.

Thank you very much. That is very helpful.

MR. ARIAIL: The first issue, which is on page 33.

THE COURT: Yes.

MR. ARIAIL: Distribution of possession with intent to distribute controlled substances.

THE COURT: Yes.

MR. ARIAIL: I just note that -- obviously, there is no charge of substantive narcotics distribution in this case. It's only conspiracy. So I think in terms of the language, it is just confusing to make reference to finding the defendant guilty of this act.

I think maybe the appropriate way to talk about it is in terms of a defendant as opposed to the defendant. There is actually no substantive charge of distribution.

THE COURT: Oh, so it is a small d, defendant?

MR. ARIAIL: Right.

Additionally, in this section there are references to cocaine base and heroin and then as you go through the recitation of the elements, there are specific references to cocaine base throughout the language. I think that should just be replaced with a controlled substance or a narcotic drug.

THE COURT: Why don't you tell me where. We are now getting into the weeds. I want to make sure that I don't miss anything.

MR. ARIAIL: Okay. So element one on page 34, it should read first, that the defendant possessed a controlled substance.

And then in the paragraph that begins, first, the government must proof beyond a reasonable doubt, the word cocaine base should be replaced with controlled substance.

Then the next sentence, the word cocaine base should be replaced with controlled substance.

On page 35, the section that begins, second element, knowing and intentional possession. The word cocaine base in the first sentence should be replaced with controlled substance.

The next edit is on the top of page 37. There is a reference to the defendant Ronald Herron. I think you can just strike the words Ronald Herron, just say the defendant.

THE COURT: All right.

MR. ARIAIL: Then on page 38, in the discussion of attempted murder in the State of New York, the second to last sentence of the section on attempted murder in New York, which begins, if you find the government has proven beyond a reasonable doubt each of these two elements, I think it should read, then you must find the charged attempted murder proven.

Because there is no specific racketeering act that we are discussing.

Then the second --

THE COURT: Hold on.

MR. ARIAIL: Sorry.

THE COURT: Okay. Got it.

MR. ARIAIL: The same goes with the last sentence, you must find, instead of the racketeering act not proven, you must find the charged attempted murder not proven.

THE COURT: Okay. Next.

MR. ARIAIL: Sorry, Your Honor. The next issue is on page 47. I think we just need to talk about it for a second.

THE COURT: Go ahead.

(Pause.)

MR. ARIAIL: Your Honor, on page 47.

THE COURT: Just a second. Yes?

MR. ARIAIL: Page 47, Your Honor, racketeering act one.

THE COURT: Yes. I am listening.

MR. ARIAIL: I think the -- the last sentence, as with the issue of guilt or innocence, determination as to drug type and quantity must be unanimous. I think that's confusing given that we are not having -- because it is a racketeering act and not a substantive count, we are not having -- we don't

have a special verdict form that -- in which they need to make a determination as to weight. I don't think -- I think that sentence by itself at the end there makes it somewhat confusing in terms of what it is that they are supposed to do.

THE COURT: This is the conspiracy count.

MR. ARIAIL: Yes, Your Honor.

In connection with --

MR. NEUMAN: It is a racketeering act, not the conspiracy count.

MR. ARIAIL: It is the conspiracy count within the racketeering acts. It's racketeering act one. We don't think that we need a special verdict for this one because it's within the racketeering acts.

THE COURT: They must -- for this racketeering act to be proven, they would have to find that the conspiracy involved at least 280 grams. Is that what you are saying? I am just trying to understand. Explain it to me.

MR. ARIAIL: Yes. My understanding is that that is not necessarily the case.

THE COURT: Really?

MR. ARIAIL: That they could find that they conspired to distribute a controlled substance. That would be sufficient for purposes of the racketeering act. That's my understanding. Which is a bit confusing, I understand.

THE COURT: Then maybe there should be a special

verdict question on it?

MR. ARIAIL: I think the -- I just don't know the answer to that, Your Honor.

THE COURT: It is your case.

MR. ARIAIL: With respect to the special verdict. I know. I understand I am here. I just need to talk to someone further about that.

THE COURT: I wish you would. Otherwise, I am going to -- if it is not necessary that -- what is alleged in racketeering act one is that the defendant intentionally conspired to distribute 280 grams or more of crack. That's what is alleged. So if the jury doesn't find 280, that he conspired to distribute at least that much, would that act be proven?

MR. ARIAIL: I think the answer is that we -- in this context we would be allowed to make a request for a lesser included charge with respect to that count. So that the defendant could actually conspire to contribute a controlled substance or he could conspire to distribute crack cocaine.

That's the issue I just want to be clear on, and so as it stands, the --

THE COURT: Then the special verdict sheet would have to ask questions in the right order.

MR. ARIAIL: Correct, yes, Your Honor.

THE COURT: All right. So you have to let me know about that and discuss it with the other side and I will take whatever objections they have. Do it by the end of the day.

MR. ARIAIL: I apologize for not having an answer right now.

MR. NEUMAN: Yes. My assumption is that it would have to be specified in the amount. Because of what Your Honor pointed out.

THE COURT: There may be case law that says otherwise. I don't know all the case law. I am just saying, that's the logic of it and I am following the logic. That's all. So if there is something else out there that I don't know about, educate me.

MR. ARIAIL: Certainly, Your Honor.

THE COURT: For the time being, I would take out that last sentence.

MR. ARIAIL: I think that makes sense.

THE COURT: And just leave it at least 280. If they don't find 280, then it is not proven. That's how I would view it.

MR. SOLOWAY: That sounds like at this point, Your Honor, you are taking out the last sentence of that paragraph?

THE COURT: That's what I am doing.

If there is something about that particular racketeering act that would permit the Court to ask the jury

specific questions and start off with, was there a conspiracy to distribute crack.

And then the second, if yes, did that conspiracy involve at least 280 grams of crack. Yes or no.

Then you can -- if they were to find yes as to -- it was a crack conspiracy, but no about the 280 or more grams, then that would be an issue on appeal as to whether that could be a racketeering -- that could be a finding of the jury based on this accusation.

MR. ARIAIL: Right. We will get back to Your Honor this afternoon.

THE COURT: All right. Fine.

In the meantime, I am taking that sentence out.

MR. SOLOWAY: Understood.

Next.

MR. ARIAIL: With respect to page 50, Your Honor.

THE COURT: Yes?

MR. ARIAIL: We would, given the way arguments went, we would strike the last sentence.

MR. NEUMAN: What page?

MR. ARIAIL: Page 50.

THE COURT: You mean, the Pinkerton?

MR. ARIAIL: The co-conspiracy liability sentence.

THE COURT: All right. I think we've already taken that out of the verdict form, haven't we?

MR. ARIAIL: Yes, Your Honor.

Well, we -- it wasn't in the verdict form with respect to the racketeering acts.

THE COURT: All right. Got that?

MR. NEUMAN: Yes.

THE COURT: Good.

Next.

MR. ARIAIL: Page 55, the last paragraph, the language is taken from the indictment. It makes reference to paragraphs eight through 15 of Count One of the superseding indictment. Then as racketeering acts one through eight, there -- I think now there are seven racketeering acts. So it should be racketeering acts one through seven.

And then I think bracketed language should be placed instead of set forth in paragraphs eight through 15 and just say as discussed above or discussed above.

THE COURT: After acts take out except for?

MR. ARIAIL: Yes.

THE COURT: In the --

MR. ARIAIL: It should read, consisted of the racketeering acts, and then in brackets, discussed above, and then it should follow, as racketeering acts one through seven, and seven should be in --

THE COURT: That's right. Okay.

So the words set forth in paragraphs eight through

15 of Count One of the superseding indictment are removed.

MR. ARIAIL: Yes.

THE COURT: And replaced with, in brackets, discussed above, and then it will read, as racketeering acts one through seven.

MR. ARIAIL: Yes.

THE COURT: Got that?

MR. NEUMAN: Yes.

THE COURT: Okay. Next.

MR. ARIAIL: On page 63 the paragraph that is headed the fourth element, defendant committed the alleged crime of violence.

THE COURT: Yes?

MR. ARIAIL: The sentence reads:

The crime of violence alleged in Count Five is the murder of Frederick Brooks. The next sentence is, since I've already instructed you as to the applicable laws of second degree murder in regard to the Count One, I think it would just be helpful in the third to last sentence to make reference to the fact that the Frederick Brooks is a second degree murder as opposed to just a murder. Then they will actually be able to put the two together.

THE COURT: You want to say murder in the second degree of Frederick Brooks?

MR. ARIAIL: The crime of violence alleged in Count

Five is the second degree murder of Frederick Brooks or the murder of Frederick Brooks.

THE COURT: I like in the second degree. Is that all you want?

MR. ARIAIL: Yes, Your Honor.

THE COURT: And then we would, I have already instructed you as to the applicable laws of second degree murder in regard -- no S -- to Count One. Is that it?

MR. ARIAIL: Yes, Your Honor.

THE COURT: Anything from the defense on that?

MR. NEUMAN: No.

THE COURT: Okay. Next.

MR. ARIAIL: Page 72, the same issue arises with respect to coconspirator liability here with the murder of Richard Russo. So on page 73, we should strike the sentence that addresses coconspirator liability.

THE COURT: That's the last paragraph.

MR. ARIAIL: I'm sorry. It -- yes, the last sentence of -- I guess it is the third paragraph.

THE COURT: If you do not find that the government?

MR. ARIAIL: Yes.

Then on page 74 -- I'm sorry.

THE COURT: So we are removing Pinkerton liability for all four counts?

MR. ARIAIL: Yes. With respect to the Russo

homicide.

THE COURT: Hold on.

So we do the same thing on page 74, right? For Count Thirteen, we take it out?

MR. ARIAIL: Yes.

THE COURT: And for Count Fourteen, we take it out?

MR. ARIAIL: Yes.

THE COURT: And for Count fifteen we take it out.

MR. ARIAIL: Yes.

THE COURT: Next.

MR. ARIAIL: Page 80 there is a sentence in the middle of the paragraph that talks about the prior felony conviction.

MR. NEUMAN: Which page?

MR. ARIAIL: Eighty.

THE COURT: Eighty.

MR. ARIAIL: It says, the defendant is alleged to have possessed a weapon charged in the indictment and I instruct you that the prior conviction is an element of the charge here and is not disputed. It is only to be considered by you for the fact that it exists and for nothing else. You are not to consider it for any other purpose. And then, you are not to speculate as to what it was for.

Then there is a final sentence. You may not consider the prior conviction in deciding whether it is more

likely than not that the defendant was in knowing possession of the gun that is charged, which is the disputed element of the offense.

I think that language is language that's used to -- typically when the prior felony conviction is narrowly crafted in a stipulation but in this case the prior felony conviction is actually substantive evidence of crimes that were charged, including the racketeering, including the narcotics trafficking, including also the possession of a firearm at the time of the arrest. It is corroborative evidence of testimony of other cooperators about where the defendant was after the murder of Frederick Brooks.

So I think this language needs to be tailored to address specifically this count and this count alone so that there is no confusion by the jury.

In particular, the sentence, you are not to speculate as to what it was for, obviously needs to be taken out because they know exactly what it was for.

THE COURT: Is that all you want or do you want to do more?

MR. ARIAIL: I think -- I need to think about it just for a second, Your Honor.

(Pause.)

MR. NITZE: We have some -- a proposal.

THE COURT: Yes?

MR. NITZE: So the proposal would be starting with the sentence, this is somewhere just above the middle of page 80, where it says, I instruct you that the prior conviction.

THE COURT: Yes. Go ahead.

MR. NITZE: So it would read: I instruct you that the prior conviction that is an element of the charge here, and is not disputed, is only to be considered by you for the fact that it exists, and, with respect to this count, and nothing else. You are not to consider it for any other purpose in your deliberations on this count. You may not consider the prior conviction in deciding whether -- and then we would cut -- it is more likely than not that, for burden issues, convicting -- conviction in deciding whether the defendant was in knowing possession of a gun that is charged, which is the disputed element of the offense.

MR. SOLOWAY: I have no problem with that, Judge, with one exception. Mr. Nitze took out, I think in its entirety, the sentence, you are not to speculate. Am I right about that? You read it --

MR. NITZE: Yes.

MR. SOLOWAY: I think that that has to be qualified too, that that sentence should continue to be in the charge and say, you are not to speculate as to what it was for with respect to your consideration of this count, rather than take it out in its entirety. Because it is part of what the

defendant is entitled to have the jury consider or not consider when considering whether to convict him of a 922(g) here.

MR. ARIAIL: I think that's just thoroughly confusing. They've had the testimony -- there has been so much testimony about what this conviction was for. It's really -- that doesn't make any sense.

MR. SOLOWAY: It doesn't -- you mean, because he was -- the minutes went in as to the felony conviction with respect to the narcotics in 130 Third Avenue? Is that what you mean?

MR. ARIAIL: Just in terms of the evidence that went, there were at least two stipulations that discussed the fact. There was testimony by Saquan Wallace as to the defendant's arrest in that apartment. There is testimony by the defendant about his arrest and conviction in that apartment. I don't really understand how they could not speculate. How we could instruct them not to speculate as to what the conviction is for.

MR. NITZE: That language is as -- it's not speculate about what the weapon was for. It's what is the conviction -- what is the nature of the conviction. In other words, when you have a felon in possession trial and the parties stipulate, this defendant has been convicted of a felony. Don't worry about what that felony was. That's just

an element that's out of your minds and let's focus on the gun.

Here, they don't have to speculate about what the conviction was for because it's in the record what it was for. There is no speculation. It is established. It is a drug conviction.

MR. SOLOWAY: Yes. I think that's right. I think it would be fair -- thank you --

MR. NEUMAN: Okay.

MR. SOLOWAY: -- to identify the fact that the defendant was previously convicted of the narcotics felony that the jury has heard about. If the government is concerned about sort of confusing the jury or leading the jury into some unwarranted speculation, we would have no -- but we are worried that the jury will in fact not be clear and if what the government would like is clarity, we have no problem with that. We can craft language that would do that.

MR. NITZE: It has -- earlier in the paragraph it says it has already been stipulated that this felony conviction -- we can put, for -- put in language like for whatever. I don't remember.

MR. SOLOWAY: Criminal possession of substance --

MR. NITZE: Third degree, occurred prior to the time. Then you can take out you are not to speculate. It will be already clear.

MR. SOLOWAY: Right.

MR. NEUMAN: 2002. 2002 felony conviction.

MR. NITZE: It's also been stipulated that this felony conviction, the 2002 conviction for criminal possession of a controlled substance in the third degree --

MR. SOLOWAY: I have to go back and check to make sure -- I think that's what he pled to.

MR. NITZE: -- occurred prior to the time and then it goes on.

Then the language we proposed after that again, I instruct you that the prior conviction that is an element of the charged here and is not disputed, is only to be considered by you for the fact that it exists and with respect to this count, for nothing else. You are not to consider it for any other purpose in your deliberations on this count. You may not consider the prior conviction in deciding whether the defendant was in knowing possession of the gun that is charged, which is the disputed element of the offense.

THE COURT: After where you say -- after and for nothing else, read slowly the balance of that paragraph, please.

MR. NITZE: Okay.

You are not to consider it for any other purpose in your deliberations on this count. You may not consider the prior conviction in deciding whether the defendant was in

knowing possession of the gun that is charged, which is the disputed element of the offense.

MR. SOLOWAY: You took out it is more likely than not?

MR. NEUMAN: Yes.

MR. NITZE: That's not the standard:

MR. SOLOWAY: We have no objection to that.

THE COURT: That's fine. Okay.

Next.

MR. NITZE: That's it with the exception of the language we have now wanted to propose on --

THE COURT: For where?

MR. NITZE: This is now on page 15. This is the punishment issue we were arguing about earlier.

THE COURT: Yes?

MR. NEUMAN: Which page?

MR. NITZE: It is page 15, paragraph or -- paragraph 19 of the charge. This is on punishment.

THE COURT: Yes.

MR. NITZE: In light of the references repeated to the life sentence during summations, we would propose that the following language be added: Furthermore -- this is to the end of that charge.

THE COURT: Yes.

MR. NITZE: Furthermore, references by defense

counsel during closing arguments to the possible sentence the defendant may face in the event he is convicted were arguments, nothing more. As I have noted, the question of possible punishment is not your concern, and the duty of imposing sentence rests with the Court alone.

(Continued on next page.)

(CONTINUING)

MR. NEUMAN: Well, I wouldn't restate the other objection we had to this, but the language. First of all, I don't know if it's necessary to identify...

THE COURT: Which Counsel.

MR. NEUMAN: Which Counsel.

THE COURT: I don't think it's necessary to identify which Counsel. Let's make it neutral.

MR. NITZE: Yes, that sounds better.

THE COURT: That way we're not pointing the finger at anybody.

MR. NITZE: Yes, that's better.

MR. NEUMAN: Aside from our other prior objections then, I don't think there is anything else.

Right, Bob?

MR. SOLOWAY: That's correct.

MR. NITZE: So, it now just references during closing arguments or something?

THE COURT: Furthermore, reference during closing arguments to possible sentence the defendant may face were argument and nothing more.

MR. NITZE: Yes.

THE COURT: The question of possible sentence, what was the rest of it?

MR. NITZE: As I have noted, comma.

THE COURT: Right.

MR. NITZE: The question of possible punishment is not your concern, comma, and the duty of imposing sentence rests with the Court alone.

THE COURT: Okay.

On Friday I resolved about capital punishment and all that; right? Everything on punishment we discussed previously remains.

You have your exception.

MR. NEUMAN: Okay.

THE COURT: All right? And you have your exception to anything that I didn't embrace throughout this discussion.

MR. NEUMAN: Yes, Judge.

THE COURT: All right.

This language having to do with the issue that resulted from the closing argument, is there any objection to that?

MR. SOLOWAY: No.

THE COURT: Then we're done.

MR. NITZE: Okay.

THE COURT: We have some deliverables.

MR. NITZE: We owe you a response on the Racketeering Act that addresses the narcotics conspiracy and the weight, so we will be back to be shortly about that.

THE COURT: Yes, I need that.

MR. NEUMAN: And also, we will have an opportunity to submit something if we...

THE COURT: Yes.

How fast you get that done? After lunch?

MR. NITZE: After lunch.

MR. SOLOWAY: This is on the unanimity and the 280 grams and we would like to also have an opportunity.

THE COURT: Yes, let's do 3:00 o'clock and 5:00 o'clock.

MR. NITZE: Great.

MR. ARIAIL: Great.

THE COURT: Do you know how many minutes there are between now and 3:00 o'clock? It's a long time.

MR. SOLOWAY: Your Honor, the only other thing.

THE COURT: Yes.

MR. SOLOWAY: That hasn't been raised that the defendant has, I think, something that he wants to advise the Court of relating to issues regarding Counsel; right?

THE DEFENDANT: Yes.

THE COURT: Is this something for an ex parte discussion or can it be said in front of everybody?

MR. SOLOWAY: Can we have one moment, Your Honor?

THE COURT: Yes.

(Pause in the proceedings.)

THE COURT: So, let me just ask a question.

Nothing that we've done on the jury charge affects, unless there is something with regard to the weight of the crack in the Racketeering Act, nothing affects the verdict sheet.

MR. ARIAIL: No, Your Honor, we addressed the one issue earlier about the unlawful discharge of firearms in connection with Count 4-D.

We struck the words responsible for the discharge of a firearm through co-conspirator liability.

THE COURT: Right. And that is on page six of the charge in connection with Count 14.

MR. ARIAIL: Yes.

THE COURT: That is the only revision in my draft in the current draft of the jury charge.

MR. NITZE: Correct.

THE COURT: All right.

MR. SOLOWAY: Your Honor, you asked a question of me.

THE COURT: Yes, I did.

MR. SOLOWAY: And I think the answer is that this is not something that needs to be ex parte.

THE COURT: All right. Is it something that the defendant would like to say now?

MR. SOLOWAY: We, it's a letter that the defendant has written. I don't know whether -- yes, it is something he

would like to say now.

THE DEFENDANT: Yes, Your Honor. I drafted a letter for you.

THE COURT: Just stand up, sir.

THE DEFENDANT: I drafted a letter for you. Due to time constraints, I couldn't send it through the normal channels so I propose it for your consideration. Hopefully, I'll read it into the record, you read it into the record.

THE COURT: Why don't you just read it into the record.

THE DEFENDANT: For your consideration, thank you, Your Honor.

THE COURT: We have time.

THE DEFENDANT: Be patient.

THE COURT: Do it slowly so the court reporter can take it down. And speak up, use the mic. You have a deep voice, so it's hard to pick up everything.

Now you can go.

THE DEFENDANT: I have a few issues of contention that I feel need to be raised. There were a lot of insinuations made at this trial, facts that were omitted that are misleading and would otherwise create doubt in any reasonable juror's mind.

I have been on trial for four weeks now and watched my attorneys' painstaking efforts to defend me and preserve my

rights, there's no denying that, but in light of the evidence offered by the Government there were facts that I insisted be submitted throughout the trial that weren't presented by the Defense, nor included in summation.

I'm not keen and astute in matters of the law, case law that states matters as to why this is ineffective assistance of Counsel, but if we can stipulate to these facts I withdraw my assertions of ineffective Counsel issues as it pertains to these issues as follows:

1) Tanya Ambrose's financial situation. In Rena Paul's rebuttal case she made speculative gestures to the jury about the existence of my girlfriend, a person she knows exists and works as a critical care nurse and now works in anesthesiology. She is also the owner of the house I lived at 830 Caton Avenue. She is also the registered owner of the 2004 tan Acura MDX I was driving, a car she's owned since 2006 while I was in prison and the 2009 BMW 650 I. The revelation of these facts casts a totally different light on my financial situation.

2) The Blackberry records. There were numerous text messages on this phone between the dates of February 2010 and April 2010 that the Government turned over that were titled Items of Interest. These transmissions between Tanya Ambrose and myself were indicative of my true financial status.

3) A letter to Jonathan Rice. A letter to Jonathan Rice from me on January 2nd, 2007 while I was in prison that details my intentions at length to go into legitimate business with him based on his proposition.

4) My school records. My high school records in 2001 from Two Bridges Academy in Brooklyn, New York and my 2008-2009 college transcripts at New York City Technical College in Brooklyn, New York. There were many aspersions cast on my transformation and how I spent my time. The revelations of these facts states contrary to what the Government has propounded and is a true indication of how I spent my time during these timeframes.

5) The Thomas Rodwell connection. There has been ample testimony at this trial about Thomas Tom-Tom Rodwell by a cooperating witness and myself. The fact that it was omitted that he was a cooperating witness for the former lead AUSA on this case Carter Burwell is misleading given the fact that he has had numerous proffer sessions with the Government and has given testimony about his drug activity at 423 Baltic Street and his participation in the Tymeek Romalise, otherwise known at Tyreek Smalls killing in which he committed on his own volition and not at my with request like Shreve Ariail attempted to insinuate during his cross-examination of me.

In light of the fact of all of these accusations of racketeering and murder and the Government's reliance on

cooperating witnesses to present their evidence, I think the question of character weighs heavy in the mind when you're evaluating the evidence and these facts disproves many of the Government's theories.

I offer this, Your Honor.

THE COURT: All right. I'll take it. It is going to be a Court Exhibit. We'll give it a number as soon as I know what the next number is, okay?

THE DEFENDANT: Yes.

THE COURT: Thank you.

All right. It's a five-page letter, handwritten letter, by the defendant to the Court, and it is dated today, June 24th, 2014.

Is there anything he is from the Government?

MR. ARIAIL: No, Your Honor.

THE COURT: Is there anything else from the Defense?

MR. SOLOWAY: No, Your Honor.

THE COURT: We will begin tomorrow morning, try to be here at 9:15, please. It is a long charge and I want to get started as quickly as possible. We will break a couple of times during the charge.

Don't rush out until you've discussed marshalling of evidence because you need to marshal the evidence tomorrow and the evidence will all go in, except the drugs and the guns. If the jury wants to see the video, they are not going to be

able to watch it in there. They are going to have to come out and watch it in here because we don't have the capability of providing video in the jury deliberation room, unless I can arrange it.

Would you like me to try to arrange it?

MR. ARIAIL: No, Your Honor. I think out here is fine.

THE COURT: It is just very difficult to arrange it, is the point. I don't know that we have the equipment. We barely have the equipment working out here, these days. So, if you want me to check, I'll check, but the arrangement I normally use is that if the jury wants to see a video, they can see it out here. They can see it as often as they want.

If the jury wants to see testimony, that we give them in redacted form back in the jury room.

MR. SOLOWAY: I don't have, I don't really care much which way we did it. The last trial I did a couple months ago before Judge Gleeson where there was surveillance video, it was supplied to the jury on a laptop in the jury room if they wanted it and that's just how he did it.

THE COURT: I think it's hard, on a laptop, for everybody to see it at the same time.

MR. SOLOWAY: Yes.

THE COURT: It's my problem, I like them all to see it the same way at the same time.

MR. ARIAIL: We can look into figuring out a way to facilitate that, Your Honor.

THE COURT: Well, if you can. It's easier for the jury if they do it in the jury room, if they know how to do it.

MR. ARIAIL: Right.

THE COURT: But if there is a way of providing the equipment, I don't think we have the capability of doing that.

MR. ARIAIL: I think we may be able to get a couple laptops for them or something along those lines.

THE COURT: All right.

Just remember that we need to move the evidence in as soon after they retire as possible so try to work that out among yourselves so they are not waiting a long time.

Is there anything else from the Defense?

MR. SOLOWAY: No.

THE COURT: All right.

Thank you everyone, have a good day.

(Adjourned to Wednesday, June 25th at 9:15 a.m.)

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